U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KELLI D. HUGHES and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

Docket No. 98-2113; Submitted on the Record;
Issued September 6, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective December 21, 1995 on the grounds that she was capable of performing her date-of-injury job without restrictions and because she was no longer experiencing injury residuals which required further medical treatment; and (2) whether the Office abused its discretion by denying appellant's request for further consideration of her case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that in September 1988 appellant, then a 21-year-old left-handed rural carrier, sustained chronic bursitis of the left shoulder and left shoulder rotator cuff syndrome, for which she underwent surgery in 1991. She stopped work on November 3, 1989, returning to limited-duty work on December 5, 1989. Appellant stopped again on January 28, 1991, returning to light duty part time on September 30, 1992. She stopped on November 2, 1992, returning to light duty on August 16, 1993. Appellant stopped work at the employing establishment in August 1996, claiming that her medical status prevented her from progressing in a postal career and entering career status, to return to school. She received compensation for periods of wage loss, and she was granted two separate schedule awards for left upper extremity impairment, the second of which was issued in error and formed the basis for an overpayment that was ultimately waived.[1]

By report dated June 8, 1993, Dr. Leonard S. Bodell, a Board-certified surgeon specializing in shoulder reconstruction, diagnosed appellant as having "persistent shoulder impingement symptomatology status postoperatively," noted that her "physical problems are continued inflammation in the sub-bursal area" which "precludes her ability to keep her arm in

[1] As recovery of this overpayment was waived by decision dated September 17, 1997. This is an issue not before the Board on this appeal; *see* 20 C.F.R. § 501.3(a). The second six percent permanent impairment award was determined on July 31, 1995 based on the July 6, 1995 objective findings by Dr. Rand noted as loss of range of motion for forward flexion, and for Grade 2 pain involving the axillary nerve.

an extended or forward flexed position for long periods," noted that "doing mail distribution on her route would be made difficult by the ongoing physical problems of persistent inflammation in her shoulder" and recommended modified duty.

By report dated June 14, 1994, Dr. Bodell noted that appellant was still on modified light work status, noted that she could not physically abduct her left arm beyond 90 degrees against gravity, noted complaints of residual shoulder tenderness and recommended continued therapy at the nontraditional pain clinic appellant had been attending.

On February 15, 1995 appellant was referred for a second opinion evaluation by Dr. David A. Rand, a Board-certified orthopedic surgeon, which was conducted on July 6, 1995. By report of that date, Dr. Rand reviewed appellant's history of 1988 left shoulder injury, of a frozen shoulder with calcifications, impingement and a small rotator cuff tear in 1991, for which she underwent arthroscopic surgery with calcium deposit removals and a partial acromioplasty, noted that appellant was performing light-duty work and had not received left shoulder medical treatment since 1994, but that she stated that at the present time her symptoms were starting to return. He noted that appellant complained that she had left shoulder pain, had limited forward flexion, did not have full range of motion and could not lift more than 20 pounds with her left arm. Dr. Rand noted that appellant had a limitation in left shoulder range of motion with forward flexion only to 100 degrees. On an attached physical assessment form he noted that appellant had forward elevation to 180 degrees on the right, but only to 100 degrees on the left, with 150 degrees being annotated on the form as "normal." He further found no rotator cuff tear, no grinding, no shoulder popping, no shoulder tenderness and a nontender acromioclavicular joint, no motor weakness, no sensory deficits, no fractures, dislocations or subluxations, no abnormal calcium deposits or any impingement problem and equal and active reflexes, grip strength and pinch strength. Dr. Rand opined that appellant's condition was stationary, that although she still had some complaints of pain, nothing on physical examination explained it, that she had a 10 percent impairment due to loss of forward flexion, and that appellant was "working light duty and I see no reason why she cannot be allowed to continue to do so."

In a September 26, 1995 request for further information, the Office asked Dr. Rand what medical findings he made which indicated that appellant "could not return to her preinjury full-duty job?" On October 10, 1995 Dr. Rand replied: "None except some limitation of motion [left] shoulder -- on forward flexion it goes 100 degrees instead of 180 degrees. However she can reach overhead by means of abduction, which is full 180 degrees." The Office then asked if there was any medical reason appellant should need future medical treatment and he replied "At present time I feel her condition is stationary. So no treatment is needed at present time. I can not state what the future will bring."

By letter dated October 23, 1995, the Office requested further clarification, asking specifically whether "the forward flexion limitation of motion of the left shoulder of 100 degrees -- not limiting her and thus she could do her full duties of her preinjury job due to her full adduction [sic] capabilities of 180 degrees or is the forward flexion limitation a minor but noted limitation which in [and] of itself would prevent her doing the full duties of her preinjury job?" An attached position description indicated that appellant would be required to lift parcels weighing as much as 70 pounds. In response Dr. Rand replied: "The forward flexion of

100 degrees is a minor limitations [sic]. By abducting to 180 degrees patient can reach overhead and thus do her regular duties."

On November 20, 1995 the Office issued appellant a notice of proposed termination of compensation finding that Dr. Rand's reports established that appellant was no longer disabled from her date-of-injury position, was medically capable of performing the full duties of her job, and no longer required medical treatment.

On December 5, 1995 the Office received a November 17, 1995 report from Dr. Bodell which noted that appellant was seen that date with "pain in the shoulder, pain radiating down the lateral aspect of her arm and then going posterior and then medial and then going down into the ring and little finger." Dr. Bodell noted that appellant had last been seen in June 1994 when she was working "on a modified work status with a 20-pound weight lift limit but it was anticipated that this would be done only occasionally throughout the day, much less than one-third of her overall time. That is to say maybe two, three [or] four times a day. The carrying would only be very short distances or half that amount of weight if she had to carry across a warehouse or something of that sort." Dr. Bodell noted, "with [that] work modification appellant was doing very well. Appellant had some residual loss of motion in her left shoulder, occasional aching but no real pain and she was able to do her job." He noted, however, that "[r]ecently she was put in a collection job which meant lifting 20 pounds as an increment but lifting them maybe 10 times in an hour or 20 time[s] in an hour with a total weight of 400 pounds. This clearly is beyond what the recommendations were medically and although I can appreciate the fact she was doing well and the effort was being made to increase her work and to see what she could do, it did n[o]t take more than maybe eight weeks before she could no longer do that job. She has now been transferred back out and has not been doing that job but as the pain has not yet resolved, there is some concern." Dr. Bodell noted positive physical findings of a little tenderness on the left side of appellant's neck at the base, a 10 degree loss of abduction in her shoulder and some diffuse anterior tenderness, and he opined that appellant had experienced some mild exacerbation of her symptoms. He recommended keeping appellant on modified work as previously outlined to avoid putting disabling physical stresses on her.

By decision dated December 21, 1995, the Office finalized the proposed termination of monetary compensation entitlement and entitlement to medical benefits finding that the weight of the medical evidence showed that appellant no longer required medical treatment due to her accepted work injury and that she was medically capable of performing the full duties of her preinjury job.

On January 18, 1996 the Office received a June 9, 1994 report from Dr. Frank W. George, II, an osteopathic physician, which noted her history of 1988 left shoulder pain onset and 1991 rotator cuff surgical repair, noted that appellant's diagnoses "in addition to the rotator cuff/left shoulder bursitis," included thoracic strain and somatic dysfunction of the thoracic, lumbar and cervical spines, and abdominal region and costal cage. Dr. George noted that functional deficits to be treated included appellant's "[inability] to fully abduct her left arm and shoulder with limited mobility here." He also noted that it was "difficult for her to do any work above shoulder height."

By report dated January 19, 1996, Dr. Bodell noted that appellant was still "experiencing some residual loss of motion in her left shoulder with occasional aching but no real pain and she was able to work at her job with the modifications that had been implemented." He noted that appellant had been working under a modified work status, that she "was moved to a different position which required her to lift the minimum 20 pounds but much more frequently and often during the day which went beyond the medical recommendation," that her present diagnosis was the same as for her original injury, and that "it appears that continued overuse of the extremity could cause recurrence and that [appellant] may need to continue on the modified work status indefinitely." Dr. Bodell further noted that appellant's "recurrence began with the change in her job in lifting more frequently. No other changes were noted in her lifestyle that would have precipitated the recurrence."

On January 23, 1996 the Office received a letter dated December 20, 1995 from Dr. Bodell, who noted that appellant was currently under his care for shoulder pain. He indicated that appellant was "put on a permanent light-duty work status in June 1994," and he enclosed supporting medical reports which were already of record.

Appellant disagreed with both the termination of her benefits. In support she submitted a statement in which she claimed that in September 1995 she asked her supervisor if the weight requirements could be lowered for a regular rural route so that she could bid for it as, although she had been free of bursitis symptoms for several months, she was concerned about her continuing weakness in the arm and the atrophy. Appellant stated that in October she advised her supervisor that her work in express mail was becoming too much for her to handle, referring to the weight of the incoming mail. She noted that on October 19, 1995 she refused to unload a vehicle because the bursitis in her left shoulder was becoming increasingly symptomatic. Appellant noted that in the collection position the 20-pound lifting maximum was reached an average of 20 times in the hour it took her to run the route.[2] She further advised that on November 1, 1995 when another station was added to the collection she would not be physically able to keep up.

The hearing was held on August 13, 1997 at which appellant testified that she could not perform the duties of her date-of-injury job, due to the fact that she could not abduct while casing mail, which required her to lean forward. She also testified that she could not do repetitive work, such as sort mail at the speed required. At the hearing, Dr. Joseph Sherman, an osteopathic physician treating appellant since 1994, stated that Dr. Rand contradicted himself without explanation when, in his July 6, 1995 report he stated that he saw no reason that appellant could not continue to work light duty, yet in his supplemental answers to Office questions, he stated that appellant could perform the full duties of her job. Dr. Sherman also opined that Dr. Rand's statement that appellant's forward flexion limitation was minor, was "irrelevant when the myofascia strain is aggravated by continued repetitive flexion motion, where the arm is raised in front of the person, rather than directly out to the side, where [appellant] ... would have to turn to do that and could n[o]t see what they are doing in front of them." He opined that Dr. Rand had not considered appellant's full job description when he

[2] Appellant neglected to number the pages of her lengthy statement and they appear to be out of order in the case record.

recommended that she return to the type of work which caused the problem in the first place. Dr. Sherman opined that appellant's "physical problems are continued inflammation in the subversal area ... which preclude her ability to lift heavy loads and it precludes her ability to keep her arm in an extended or forward flex position for long periods of time casing. Similarly doing mail distribution on a route would be made difficult by the ongoing physical problems of persistent inflammation in her shoulder." He testified that appellant's problems were due to tendinitis and bursitis, which were soft tissue problems which did not show up on x-ray.

By decision dated September 17, 1997, the hearing representative found that, although it was questionable as to whether appellant was capable of performing the duties of a letter carrier without restrictions, appellant admitted that she was not experiencing any disability residuals from the 1988 left shoulder injury and that her shoulder was "very stable." However, the hearing representative did note that appellant claimed to have "some aching, which [she was] pretty much accustomed to," and that she had continuing pain if she used the shoulder in a repetitive manner, but otherwise it did not bother her. The hearing representative concluded that appellant's left shoulder did not appear to be affecting appellant's activities too dramatically, noting that she had not received medical care for her shoulder in the last few years and indicating that there was no evidence that appellant left the employing establishment due to her being physically unable to perform her job, but noted, rather, that she left to continue her schooling. The hearing representative noted that Dr. Rand found no objective evidence of continuing disability, no radiologic abnormalities or crepitation, no evidence of an impingement problem and no tenderness in the shoulder, and indicated that any limitations on appellant's work capacity were prophylactic. The hearing representative noted that Dr. Rand found nothing to justify appellant's subjective complaints. The hearing representative noted that Dr. Sherman testified that appellant's problems were due to tendinitis and bursitis, which were soft tissue injuries which did not show up on x-ray. The hearing representative noted that "while the medical opinions of Drs. Bodell and Sherman do support continued disability, they are not based upon objective evidence and are based upon examinations which transpired over three years ago," and thus are of less probative value. The hearing representative found that Dr. Rand's report constituted the weight of the medical evidence.

By letter dated December 10, 1997, appellant requested reconsideration, noting that her claim had been accepted for bursitis/tendinitis, that Dr. Rand's two opinions contradicted each other and that there was a conflict in medical opinion evidence between Drs. Rand and Bodell. Appellant further argued that it was inconsistent that the Office could find that inflammation and tenderness to palpation was "objectively sufficient" to accept a claim for chronic bursitis, yet find that the continued presence of the same symptomatology was insufficient to maintain the same claim. Appellant argued that the Office failed to meet its burden of proof to terminate her claim.

In support of her request, appellant submitted an October 6, 1997 letter from Dr. Sherman, which provided an opinion regarding the hearing representative's decision.

By decision dated April 30, 1998, the Office denied appellant's request for review of her case, finding that the evidence submitted was cumulative and not sufficient to warrant reopening

the case for further review on its merits. The Office found that Dr. Sherman's arguments had previously been appropriately addressed by the hearing representative.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[5] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[6]

The Office failed to meet its burden of proof to terminate appellant's compensation benefits.

In the instant case appellant submitted medical evidence supporting the continued existence of bursal inflammation and resulting pain, tenderness, weakness, and decreased motion in June 1993, June 1994 and November 1995. Dr. Bodell noted that the increase in the amount of lifting in the form of increased occurrences of lifting "not more than 20 pounds"[7] per hour during the period from August through November 17, 1995 contributed to her Fall 1995 exacerbation of left shoulder chronic bursitis symptomatology.[8] Dr. Sherman later testified that bursal inflammation, and appellant's accepted condition noted as "chronic bursitis," were soft tissue injuries which did not lend themselves to visualization on radiologic examination or other "objective" testing indices as employed by Dr. Rand and relied upon by the Office.

On the other hand, Dr. Rand, who examined appellant on July 6, 1995, prior to the Fall 1995 left shoulder exacerbation due to increased frequency lifting, found no symptomatology of

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[5] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[6] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

[7] Lifting not more than 20 pounds was part of appellant's modified-duty recommendations by Dr. Bodell from his reports dating from 1993 to 1995.

[8] This opinion supports appellant's allegations of a recurrence of disability under *Hedman*. An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements; *see Terry R. Hedman*, 38 ECA 222, 227 (1986).

bursal inflammation or other mechanical left shoulder pathology, except for a loss in range of active motion of 80 degrees. Dr. Rand noted that besides appellant's complaints of left shoulder pain and lack of full range of motion, she also complained of the inability to lift more than 20 pounds. Dr. Rand noted on July 6, 1995 that appellant could continue on light duty. He subsequently found that appellant could perform the full duties of her rural letter carrier position, noting that she could abduct to 180 degrees overhead. The Board finds that Dr. Rand's opinion is in conflict with opinions of Drs. Bodell, Sherman and George regarding continuing disability on or after November 17, 1995 due to appellant's accepted conditions.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

As Dr. Rand's opinions create a conflict with the other medical opinions of record, which has not yet been resolved, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Accordingly, the Office of Workers' Compensation Programs' September 17, 1997 hearing representative's decision is reversed with respect to the termination of appellant's benefits. The April 8, 1998 decision of the Office is rendered moot.

Dated, Washington, D.C.
September 6, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member